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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAULA J. OMANSKY PART 47

Justice

Jackson, Richard

- v -

Westminster House

INDEX NO. 115879/01

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion denied in accordance with accompanying memorandum.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 8/22/02

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

RICHARD AND SANDRA JACKSON

Plaintiffs,

-against-

WESTMINSTER HOUSE OWNERS, INC., MAXWELL-KATES, INC., MARK McANDREWS, DR. CHARLES BRENNER, JUDY KADOORY, MICHAEL MILLER, JAY NEWMAN and MICHAEL PLOTTEL,

Defendants.

Index No. 115870/01

DECISION AND ORDER

PAULA J. OMANSKY, J.:

Defendants move to reargue an order of this court dated 4/29/02 (the order) which denied their motion to dismiss the complaint and for sanctions. The facts of the case as stated in that decision/order are as follows:

Plaintiffs, the proprietary lessees of apartment 14 E at the subject premises, WESTMINSTER HOUSE (Westminster), seek damages and a rent abatement in connection with their alleged inability to use their terrace and for damage to plants and planters during the course of repairs undertaken by Westminster. According to the affidavit of Alvin Elias, an employee of MAXWELL-KATES, INC.(Maxwell), the property manager, the building was required to make emergency repairs to the facade in July, 1998, which was found to be in danger of collapsing. Elias states that the proprietary lease gives Westminster the right to erect equipment on the roof and terraces to perform repairs, and affords it the right of access to effecutuate those repairs.

Plaintiffs withheld maintenance in protest of the continued use of their terrace and damage to their property, allegedly dating back to 1996, accumulating approximately $15,000 in arrears.

On April 10, 2001 plaintiff Richard Jackson (Jackson) wrote to Maxwell and submitted a maintenance arrears check for $10,191. He stated that in the absence of a settlement offer from management, he intended to bring litigation "to redress [his] injuries...[that] said lawsuit will focus on the breach of the covenant of quiet enjoyment and the resulting nuisance" over a course of years, in addition to seeking redress for the "wanton destruction" of plaintiffs' property. Jackson also expressed his intention to seek punitive damages.

Defendants allege that a letter dated April 30, 2001 from Maxwell to Jackson which states:

> In accordance with the Board's agreement with you, the June maintenance bill will reflect the following credits: 1. $1,700.00 for planters, 2. $300.00 for planting soil.

constitutes an accord and satisfaction of the entire matter. They argue that said amount had been deducted from the outstanding maintenance arrears owed by plaintiffs, and that plaintiffs paid the balance of outstanding maintenance arrears at that point. Elias states that it was the understanding of all of the parties that the $2,000 settlement resolved all of the issues regarding

the planters and damage to plants. Plaintiffs deny having accepted any settlement, and state that Emigrant Savings, the mortgagee, accepted the maintenance reduction in order to preserve their collateral which was threatened by a non-payment proceeding; that there was never an accord and satisfaction. Jackson states that neither he nor his wife ever agreed to accept the $2,000 in settlement of all of their claims; that he had been in the habit of spending many hours tending to his prized collection of 10-foot high juniper trees and and hybrid rose bushes ranging in height from 4 to 6 feet and which had required custom planters; that work which was to have been completed by 1998 was not completed until 2001, and that thus he had been deprived of his gardening pursuits; that the workmen were using the plaintiff's terrace as a staging area, storing heavy equipment there, and were actually performing welding on large metal pieces for use elsewhere, causing extensive dust and noise which disturbed him and his wife. With regard to damage to his plants and trees, Jackson states that management assured him that his trees and plants would not be harmed; that the plants and furniture on the terrace did not have to be removed and would be protected; that subsequently, defendants advised plaintiffs that the planters would have to be removed, and that the management would pay for the soil and the planters, but that plaintiffs were to be given the opportunity to transfer the rosebushes for safekeeping. However, Jackson states that in September 2000, without notice to plaintiffs, and without having agreed to an

amount for compensation, defendants removed their 46 rosebushes and destroyed the planters. He added that four juniper trees were severly damaged and had to be repaired with clamps by a tree surgeon and that their survival is in jeopardy.

The complaint in this action alleges breach of contract, breach of warranty of habitability, breach of fiduciary duty, partial constructive eviction, trespass and nuisance, and negligence.

DISCUSSION

The motion to reargue is granted, and upon reargument, the court adheres to its original decision

On this application, the defendants challenge that part of the order which rejected defendants' position that the plaintiffs' claims had been completely resolved by their acceptance of a $2,000 maintenance abatement, which, they claimed, represented an accord and satisfaction. Upon reconsideration, the court still finds that the terse letter of April 30, **2001**, does not, as defendants maintain, represent "a credit to their maintenance account in full satisfaction of the plaintiffs' claims". The letter is what it is: an acknowledgement that the plaintiffs agreed to accept an abatement of $2,000. That the plaintiffs may have stated in their April 10, 2001, that they would not pay the balance of the arrears until "the resolution of the current problem concerning both the destruction of ...personal property and the infringement of the quiet enjoyment of [the] apartment", coupled with the fact that

the plaintiffs later paid the arrears, does not, without more, lead to a determination as a matter of law, that the acceptance of $2,000 warrants dismissal of the action on CPLR 3211(a)(1) [documentary proof] and 3211(a)(5) [accord and satisfaction] grounds. If Maxwell-Cates, an experienced real estate operator, had intended that the $2,000 maintenance abatement constitute a satisfaction of all claims, it should have so stated. Further, as plaintiffs argue, on March 19, 2001, the defendants initially denied plaintiffs' request for any kind of abatement, stating that the "building has the right to use the terrace to make repairs". Obviously, the defendants changed their position to some extent, but the court cannot, on these papers, reach the conclusion that the plaintiffs abandoned their extensive claims in return for an abatement of $2,000. Even if arguendo, the court misapprehended facts surrounding the timing of the alleged payment of $2,000 to Emigrant Savings Bank, such fact does not resolve the problems raised by defnedants' "documentary proof" offered in support of its motion to dismiss.

Accordingly, it is

ORDERED that the motion to reargue is granted, and upon reargument, the court adheres to its original decision.

This constitutes the decision and order of the court.

DATED: 8/22, 2002

PAULA J. OMANSKY

J.S.C.